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Court of Appeals
Division II
State of Washington

NO. 50118-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHELLY MARGARET ARNDT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00428-0

BRIEF OF RESPONDENT

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SERVICE	Jodi R. Backlund Po Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 12, 2017, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us**

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2. Whether the trial court acted within its discretion in concluding that there was no objective prejudice from the juror misconduct proved by Arndt which was only that the juror looked up definitions of premeditation that were consistent with the instruction given at trial and Washington law, and where premeditation was not a significant issue at trial?

II. STATEMENT OF THE CASE

A. CONVICTION

A Kitsap County Superior Court jury found Shelly Margaret Arndt guilty as charged of nine counts:

Count	Charge	Victim	Aggravator(s)
I	Premeditated First-Degree Murder	Darcy "Junior" Veeder	Arson (aggravated murder) Domestic Violence Vulnerable Victim
II	First-Degree Felony Murder	Darcy "Junior" Veeder	Domestic Violence Vulnerable Victim
III	First-Degree Arson		Domestic Violence Impact on Other Persons
IV	Second-Degree Assault	Kelly O'Neil	Domestic Violence
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VIII	Second-Degree Assault	D.T.	
XI	Second-Degree Assault	Donald Thomas	

CP 1-2.

In December 2015, as required by RCW 10.95.030(1), the court sentenced Arndt to life without the possibility of parole on Count I. CP 3. No sentence was imposed on Count II. *Id.* The court imposed standard range sentences on the remaining counts, to run concurrently to Count I. CP 3-4. Arndt appealed, and that case is pending before this Court. *See State v. Arndt*, No. 48525-7-II. No issues regarding premeditation were raised in that appeal.

B. NEW TRIAL MOTION

Nearly a year after the verdict,[1] on October 14, 2016, Arndt filed a motion for new trial alleging juror misconduct. CP 13. The motion alleged that Juror 2 (Violet Watson) sought out an unnamed local defense attorney.[2] That attorney was later determined to have been Jeniece LaCross, the sister of trial counsel David LaCross. CP 44.

The motion alleged that Watson told Ms. LaCross that "she had

[1] The jury rendered its verdict on November 23, 2015. RP (11/23/15) 3-8.

[2] The motion also alleges that Juror 3 researched the term premeditation, but that appears to be a typo; there is no other allegation in the record regarding a second juror.

changed her verdict from not guilty to guilty based on independent research she had done." CP 13. According to the motion, Watson said she was struggling with the meaning of premeditation and looked up the word at home. *Id.* Arndt also alleged that Watson told the other jurors of the results of her research. *Id.*

Appended to the motion was the declaration of defense investigator Jim Harris. There were no declarations from Watson or other jurors.

In Harris's declaration he asserted that he met with Watson on September 3, 2016, and she told him that she picked up her cell phone and gave her phone the command "the definition of premeditation." CP 16-17. She then showed him three definitions on her cell phone that came up. CP 17. Harris appended photos he took of the definitions to his declaration. CP 17, 18-20. According to Harris, Watson said she read numerous others but could not find them during the interview. CP 17.

Harris stated he asked Watson if reading the definitions helped her change her mind and her verdict to guilty. CP 17. Watson allegedly said they did, because of the word "short" in them. *Id.*

Harris finally averred that Watson told him she had shared her research with the other jurors. CP 17. She said she did not show them the definitions, but did talk with them about the outcome of her research. *Id.*

After the motion was filed, the State undertook its own investigation. CP 22. The State's investigator, Alexandra Mangahas spoke with Watson on two occasions, with Ms. LaCross, and nine other jurors (three alternates and seven of the deliberating jurors). *Id.* The State attempted to, but was unable to contact the remaining jurors. *Id.*

The State submitted declarations from Mangahas outlining her investigation. CP 37, 39, 41. On October 24, 2016, Watson told Mangahas that following the closing arguments, jury deliberations went on for several days. CP 37. Watson was bothered by the term premeditation and was having a difficult time deciding guilty or not guilty. *Id.* She then looked up the definition of premeditation while she was at home and that assisted her with deciding on guilty. *Id.*

Watson also stated that she had seen Ms. LaCross at Costco. CP 37. Watson knew her from her past. *Id.* The two spoke about the case and Watson told Ms. LaCross that she came to the decision of guilty after she looked up the definition of premeditation. *Id.* About a week later, Watson received a call from Harris, who asked to meet with her to discuss the case and how she came to the decision she did. CP 37. Harris told her that this was common practice especially where there would be an appeal. *Id.* Watson agreed to meet with Harris and told him that she researched the word premeditation. *Id.*

Watson recalled the judge instructing jurors not to conduct research during the trial but she did not consider looking up a definition to be research. CP 37. Watson could not recall whether she shared information about her research of the definition with the other jurors. *Id.*

Several days later Mangahas presented some follow-up questions to Watson. CP 39. Watson advised that she looked up the definition of premeditation during deliberations but did not recall what day. *Id.* She reiterated that she did not consider looking up a definition to be research and did not realize she was doing anything wrong. *Id.* Watson stated that the words "however short'" in the definition struck her, but that she was already leaning heavily towards a guilty verdict. *Id.* She did not recall if she shared her research with any other juror. *Id.*

Watson knew Ms. LaCross from outside the legal realm and recalled observing Ms. LaCross sitting in the courtroom during the Arndt trial. CP 39. She was unaware that Ms. LaCross was related to Arndt's trial counsel David LaCross. *Id.*

Watson had seen Ms. LaCross several months before the interview while she was at work at Costco. CP 39. She did not recall the exact date. *Id.* Watson talked to Ms. LaCross about the case and her experience as a juror. *Id.* Watson told Ms. LaCross about looking up premeditation. *Id.* Ms. LaCross did not press her for further information. *Id.* Approximately a

week later Harris came to see Watson while she was at work at Costco. *Id.* Watson thought it odd that he sought her out but Harris told her that it was common practice for him to speak with jurors about their experiences. *Id.*

Watson told Harris that she had researched the term premeditation. CP 39. Harris took pictures of some sites on her phone that she may have looked at. *Id.* However, she could not recall the actual site she looked at– only that it included "however short" in the definition. *Id.* She did not know if the sites she showed Harris were the actual sites she looked at during deliberation. *Id.*

Mangahas also contacted Jurors 1, 4, 5, 6, 7, 13, 14 and the two alternates. CP 41, 43. None of them had any knowledge of any juror conducting outside research. CP 41-43.

Mangahas also spoke to Ms. LaCross, who said Watson told her that she was the last holdout for a guilty verdict because she was struggling with the term premeditation. CP 44. She told Ms. LaCross that she sought an outside resource to help her better understand the term. *Id.* Ms. LaCross did not question Watson further, but did advise her brother, David LaCross of what Watson told her. *Id.*

C. TRIAL EVIDENCE OF PREMEDITATION

1. Arndt's actions the weekend of the fire.

There was ample evidence of premeditation admitted at trial.

Specifically, the evidence admitted at trial revealed that Arndt had a plan to kill Darcy Veeder, Jr.,[3] which she started in motion the Friday before she lit the fire.

Arndt scoped out the basement area where the fire began the day before the fire. She came up with a cover story about the dog urinating on the bean bag chair when she was seen downstairs.[4] 6RP 1008, 1086. This was contrary to the experience of family members who stated that the dog never went downstairs and had not had an accident inside since he was a puppy. 6RP 1008-09, 1084, 1086.

The night of the fire, Arndt provided alcohol to get Junior so drunk that he could not be awakened when the fire was started. He would often drink until he passed out. 6RP 1105. They day of the fire, they began drinking at lunch, and she went out near midnight to buy him another 12-pack of beer. 6RP 1059. He became quite drunk.[5] 6RP 1064.

Arndt changed the location of where she and Junior were sleeping from Friday night to Saturday night. 6RP 1089. Because of this Junior was unable to maneuver the narrow opening between the furniture and the

[3] As it did in its direct appeal brief, the State will refer to Darcy Veeder, father and son, will be referred to as Senior and Junior to avoid confusion. No disrespect is intended.

[4] The family was in the process of renovating the lower level of the house, which also had no heat, so there would be little reason to be down there on a February day. 6RP 958, 961, 1018, 1083, 1086.

[5] At the time of the autopsy Junior had a blood-alcohol content of .27. 11RP 2095.

hearth to escape the living room. It also allowed her to use Donald Thomas as an alibi witness. 8RP 1359. Although she asked him to wake Junior, Arndt did not mention to Thomas that Junior slept so hard when he was drunk that Thomas would essentially have had to drag Junior out of the house. 7RP 1210, 1231, 8RP 1262.

Arndt took great pains to get every single person out of the house except Junior. Indeed there was testimony that when Kelly O'Neil tried to go back into the house, Arndt tried to stop her. 6RP 1053.

When Central Kitsap Fire and Rescue arrived at the scene, they were initially given "a lot of misinformation." 7RP 1305. They were told that a child was trapped on the first floor. 7RP 1305. They therefore focused their search there. 7RP 1305. It was a slow and difficult search due to the heavy smoke. 7RP 1306.

They were then told the victim was on the second floor, so they proceeded there. 7RP 1306. They eventually found Junior in the middle of the living room under some sheetrock that had fallen from the ceiling. 7RP 1309. He was dead. 7RP 1310. The dog was with him and also dead. 7RP 1310. Junior was about six feet from the couch, in the middle of the room. 7RP 1311.

2. Arndt's 2011 attempt to burn down the house while Junior was passed out

In 2011, Arndt was convicted of a remarkably similar crime, with Junior again the apparent target.[6] The fire occurred at the home she shared with Junior and Senior in Bremerton. 11RP 1951. Arndt and Senior were watching TV after 2:00 a.m. 11RP 1953-54, 2005, 2079. Junior was passed out in bed. 11RP 1954, 2080. Arndt told the fire marshal at the scene of the fire that she had gone downstairs to the basement to check on a blanket in the dryer. 11RP 1955.

Fifteen minutes later, the dog "freaked out" and then the smoke detector went off. 11RP 1955, 1956. Senior went down and found a chair on fire. 11RP 1956. He tried to put it out, but the fire was too big. 11RP 1956. They evacuated and called the fire department. 11RP 1957.

The fire marshal determined that the fire had clearly started on the chair. 11RP 1961. There were some rags and debris on it. 11RP 1961. It was full of stuff. 11RP 1969. The only explanation for ignition was someone applying an open flame to it. 11RP 1966. There were no possible sources of ignition near the chair. 11RP 1966. The fire marshal concluded the fire was incendiary. 11RP 1972.

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[6] The night of the fire that killed Junior, Arndt's nephew heard them arguing about Junior having bought a fire extinguisher for their home, with Arndt asserting it was not needed. 6RP 1024.

There had also been a fire at the house the day before, at 1:23 a.m. 11RP 1971, 2005. Two fires in the same house a day apart was unheard of. 11RP 1973. When the marshal came out, he also looked at the area that had burned the day before. 11RP 1971. There was a television sitting on the carpet in the front bedroom that had burned. 11RP 1959, 1971. .

Contrary to what she told the fire marshal, Arndt told the Bremerton police that she had not gone downstairs before the fire. 11RP 2081. She stated that Senior had gone downstairs. *Id.* Then she stated she had gone down to get some paper towels. 11RP 2082. She said she had used a lighter to try to unseal the packing tape on the box the paper towels were in. 11RP 2083. The towels caught on fire and she panicked and went back upstairs hoping that the fire would go out. 11RP 2083.

The detective also questioned this story and Arndt then admitted that she had started the fire on purpose. 11RP 2083. She set a box of paper towels on top of the chair on fire. 11RP 2083. Arndt said she had tried to burn the house down so that Junior would move out of his father's house because she was tired of living with Senior. 11RP 2084.

Arndt denied having any involvement with the fire the day before that involved the TV. 11RP 2084. She said she had noticed smoke coming from under the door of Senior's room and notified Junior who had gone in and found the TV on fire in the unoccupied room. 11RP 2085.

3. Other domestic disputes between Arndt and Junior

About a month before the fatal fire Bremerton police responded to a 911 call at the Veeder/Arndt residence. 12RP 2174-75. Arndt was the reporting party. 12RP 2180. The police separately interviewed the residents. 12RP 2175, 2181. Arndt was quite intoxicated and asserted that Junior had slapped his father in the face. 12RP 2176, 2178, 2184. There was no evidence to corroborate the claim. 12RP 2176, 2181. No arrests were made. 12RP 2177. Arndt became enraged when she was informed they would not be arresting Junior. 12RP 2177. The relationships between the three was not clear. 12RP 2176, 2184. The dynamics seemed unusual. 12RP 2177.

There was a second hang-up call to 911 that evening. 12RP 2183. The police returned to the house. 12RP 2183. Arndt asserted that Junior had slapped his father again. 12RP 2183. There was again no evidence of an assault. 12RP 2183. Arndt again became upset when they told her they would not be arresting Junior. 12RP 2183. Arndt had been drinking. 12RP 2184.

In 2008, police responded to the Arndt/Veeder home after a report that Arndt had stabbed Junior in the stomach. 17RP 3206. Arndt, who appeared extremely intoxicated, was the 911 caller and admitted stabbing Junior. 17RP 3207. Junior stated that they were arguing and she suddenly

grabbed a large kitchen knife and stabbed him in the chest. 17RP 3207. Junior had a small scrape on his chest. 17RP 3207. Arndt was subsequently convicted of assault for the attack. 17RP 3207.

4. Arndt's actions following the fire.

Arndt's behavior after the fire was also consistent with consciousness of guilt and with the notion that Arndt premeditated Junior's death. The fire occurred during the early morning hours on Sunday. The very next day, Monday, Arndt went to the HR manager where Junior worked to verify that she was the beneficiary under his life insurance policy. 7RP 1175, 1178, 1186. Junior, however, had removed her as a beneficiary.[7] 7RP 1178. Curiously, while they were discussing the fact that he died in a fire, Arndt remarked to the manager that if she "had it to do over again, [she] would do it differently." 7RP 1180, 1183.

That same Monday, Arndt showed up at the Tuell-McKee Funeral Home at 8:40 a.m. 7RP 1253. The business did not open until 9:00. 7RP 1254. Arndt wanted to know about cremation. 7RP 1255. The incident stuck in the mind of the office manager there because Arndt was so matter-of-fact. 7RP 1255. The manager told Arndt she would have to talk to the funeral director about pricing, but he was not in yet. 7RP 1254. The manager told her the funeral director would be in at 9:00. 7RP 1255. Arndt

[7] Junior had a life insurance policy for $50,000, with a doubling provision in the event of

took a pamphlet and left. 7RP 1254.

Arndt also went to the Miller-Woodlawn Funeral Home. 7RP 1264. The manager there explained that his first task in meeting with families was to establish who was the legal next of kin. 7RP 1267. She introduced herself as Junior's fiancée, which did not qualify her as next of kin. 7RP 1268. He asked Arndt if Junior had a wife or children. 7RP 1268. She said he did not. 7RP 1269. She said he was survived by his father. 7RP 1269. She said she could '"get the dad in to sign the paperwork."' 7RP 1271. The manager asked if Junior's mother were alive. 7RP 1269. Arndt stated that his mother was out of the picture. 7RP 1269. The first thing Arndt wanted to talk about was cremation. 7RP 1270. After she left, the manager called the coroner to determine when the body would be available for release. 7RP 1272. The coroner could not tell him when that would be. 7RP 1272.

On the Thursday after the fire, Anthony Cowan, who had been a friend of Junior since age seven, stopped by to see Senior after he heard Junior had died. 11RP 2100, 2105. He spoke with Arndt, whom he had not met before. 11RP 2102, 2105.

Arndt told him that she had smelled smoke, but thought it was just from the fireplace. 11RP 2106. Contrary to her account at the scene, Arndt

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an accidental death, for a total of $100,000. 17RP 3263.

asserted that she heard Thomas yelling "fire" from downstairs. 11RP 2106. She told Cowan that she rolled over Junior and ran downstairs to Kreifels's room, kicked the door open and dragged her outside and then waited for the fire department to arrive.[8] 11RP 2106.

She said she thought Thomas was getting Junior. 11RP 2106. She said Junior was not drunk. 11RP 2107. She told Cowan she had held Junior after they brought him out of the house and had seen that his beard was burned off his face.[9] 11RP 2110.

Arndt also told Cowan that Junior had insurance through work and she and Senior had rights and no one else would get a dime. 11RP 2112. By "no one else" she meant Junior's mother. 11RP 2112. She said there was a hold on Junior's debit card and they could not get any money out. 11RP 2113. She also said that she and Senior were not happy that they were not involved in the obituary that was published. 11RP 2114.

Cowan next talked to Arndt the following Monday. 11RP 2109. He had called to check on Senior, and Arndt told him he could not come to the phone because he was immobile. 11RP 2116. Senior had seemed fine the day Cowan had visited. 11RP 2116.

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[8] This is contrary to the accounts of the other witnesses who stated Kelly O'Neil and Arndt went back in after Kreifels after they had emerged from the house. 6RP 1097-98.

[9] The deputy coroner explained that they would not let any family member observe the body at a scene like this; and moreover, the body would have been encased in a black BioSeal bag when it was removed from the house. 8RP 1372-73.

During their Monday conversation, Arndt also told him that no one had seen Thomas since the fire. 11RP 2120. Arndt said that he had been in the basement and might have been down there smoking and maybe nobody had seen him because he accidentally started the fire and was worried what was going to happen to him. 11RP 2120. She said Thomas had gone down there for a football at 1:45 a.m. and was down there for five to 15 minutes. 11RP 2121. She said the fire had occurred minutes after he was down there. 11RP 2121.

When Arndt called Cowan the next day, she was angry about the cremation situation. 11RP 2122. She also told him not to post the funeral date on social media because she did not want Junior's mother or sister to find out about it. 11RP 2123.

That Thursday Arndt told Cowan she was frustrated that no one, not even Thomas, had stopped by. 11RP 2124. However, later in the conversation she said that Thomas had stopped by, but she did not want to say what he said because it was shocking and disturbing. 11RP 2124. She did not want to say what it was over the phone and said Cowen would have to come by. 11RP 2125.

Cowen went by a few hours later. 11RP 2125. She told him that Thomas had come by with a smirk on his face and asked for some of Junior's stuff. 11RP 2126. He seemed cocky or arrogant and Arndt said it

pissed her off. 11RP 2126. Arndt claimed that Thomas said that he and Junior were poking around in the fire and he assumed that an ember got in the vent and started the fire. 11RP 2126. She also asserted that Thomas said that he did not wake Junior, he just nudged him. 11RP 2127.

Cowen asked Arndt if she had told the police this information, and she said she had not because she thought she was under investigation and was afraid of what might happen. 11RP 2129. He told her she needed to confront Thomas and ask him if he accidentally started the fire, ask Kreifels if she had seen Thomas downstairs, and to tell the police what she had told him. 11RP 2129. She said she would. 11RP 2129.

Arndt called Cowan back on Friday, and said she had done all three things. 11RP 2130. She said Thomas did not recall starting a fire. 11RP 2131. Kreifels did not remember Thomas being downstairs. 11RP 2131. She also said she had contacted the sheriff's office. 11RP 2131.

That same Friday, the Kitsap County Coroner's Office received a call asking for the death certificate from Miller-Woodlawn Funeral home on behalf of Senior and the family. 8RP 1351, 1353. They also talked to Senior on the same date. 8RP 1353. A woman's voice was in the background was feeding him all the questions he was asking. 8RP 1353. She sounded angry. 8RP 1354.

Cowen spoke with Arndt again on Saturday, and she was upset

because Junior's mother or sister had been quoted in a newspaper article saying that Arndt was not his fiancée. 11RP 2132. She asked him to check the article and call back. 11RP 2132. Cowan looked but was unable to find any article, so he did not call back. 11RP 2132.

Cowan was subsequently interviewed by the police about his conversations with Arndt. 11RP 2134. Arndt had told Cowan that she thought Thomas should be a suspect. 11RP 2142. She was angry that the police were not considering him to be the lead suspect and that she was a suspect. 11RP 2143. He did not talk to her again after that. 11RP 2134.

Almost three weeks after the fire, police re-interviewed Arndt at her home. 17RP 3241. When they arrived, Senior answered the door. 17RP 3241. They told him they wanted a little more information about Junior. 17RP 3243. He opened the door just enough to fit through and stepped out and closed the door behind him. 17RP 3243. They asked to speak to Arndt and he said she was not home. 17RP 3243. Her car was out front, however. 17RP 3244. They spoke with Senior for a while and he relaxed a bit. 17RP 3244. At the end, they asked again if Arndt was there and Senior went and got her. 17RP 3245.

Arndt appeared guarded and defensive. 17RP 3245. She had not told police the alleged information about Thomas that she had told to Cowan. 17RP 3245. They wanted to give her the opportunity to bring it

up. 17RP 3246.

Arndt told them that during the fire Thomas told her that he "shook" Junior to try to get him up. 17RP 3248. She said after the fire he came to her house and used the term "nudged" instead of shook. 17RP 3248. Arndt expressed concern to the police about Thomas's change of terms. 17RP 3249. She also stated that she did not know if he went downstairs to smoke, but had concerns that he might have. 17RP 3249. She said she was only speculating, because she was asleep. 17RP 3249. She also stated that did not see Junior and Thomas trying to rekindle the fire; she said Thomas told her that. 17RP 3249. She did not say anything about him retrieving a football from downstairs. 17RP 3250. Nor did she say that he went downstairs a second time before the fire. 17RP 3250.

The day of the fire, Arndt had told the police that Junior had had two Jack and Cokes and a bloody Mary at the restaurant and two cases of beer and three or four more Jack and Cokes at the house. 17RP 3251. In the second interview, Arndt said the same thing about the restaurant, but that at the house it was a case of beer and that her sister had gone to get another one. 17RP 3251. There was no mention of more mixed drinks. 17RP 3251. No one else said that Kelly O'Neil had gone to buy beer. 17RP 3251.

Arndt asserted that she smelled and then saw smoke in the living

room. 17RP 3252. The day of the fire she said that she had smelled smoke but did not see any. 17RP 3252. She said Junior did not stir when she climbed over him. 17RP 3253.

They asked her how she thought the fire might have started. She said she thought it "sucked" and wanted to know what happened. 17RP 3253. They asked how she would feel if she learned that it was started intentionally. 17RP 3253. She said it would be ridiculous to blame anyone. 17RP 3253. She said she did not want to blame anyone, but people were blaming her. 17RP 3253. They asked her why, and she said because she had a second-degree arson conviction. 17RP 3253-54.

Arndt told them that before the 2011, fire, Junior had been pissing her off and drinking and she went downstairs and lit a towel on fire and then put it in a box of towels that was already on the chair. 17RP 3254-55. Then she went back upstairs. 17RP 3255. During the whole conversation she never expressed any outrage about Junior being dead. 17RP 3255.

A few months after Junior's death, Erin Koch went with her friend Debbie Lafferty to Senior's house. 7RP 1137, 1165. Lafferty was Junior's aunt, and they were there to pick up some of his belongings. 7RP 1137.

Shortly after they arrived, Arndt came out. 7RP 1139. She had left the room when she heard the knock because she was afraid it was the police. 7RP 1142.

Junior's mother had requested that they get a particular jersey that had sentimental value. 7RP 1141. Arndt commented that it was in a box of things that had to be gone through "from the first fire." 7RP 1141.

Arndt talked a bit about the fire at the O'Neil home. 7RP 1143. Arndt said that that evening she had been in the living room with Junior. He had fallen asleep and she was cold so she went downstairs to try and start a fire. 7RP 1144. She could not get it started so she came back upstairs and went to sleep with Junior on the couch. 7RP 1143.

Arndt said she woke up to the smoke detector going off. 7RP 1144. She then went downstairs to see why it was going off and realized there was a fire. 7RP 1144. She came back up and woke her sister, and got her sister's kids out of the house. 7RP 1144. Then she claimed she went back upstairs to shake Junior to try to wake him. 7RP 1144. Then she stated that she started down the stairs and then came back up the stairs because she had forgotten a coat or a purse. 7RP 1144.

D. TRIAL JURY INSTRUCTION ON PREMEDITATION

Before deliberations, the trial court gave the standard instruction on premeditation from WPIC 26.01.01:

> Premeditated means thought over beforehand. When a person after any deliberation forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be

premeditated.

> Premeditation must involve more than a moment and point in time. The law requires some time, however long or short, in which a desire to kill is deliberately formed.

22RP 4322.

E. TRIAL COURT'S RESOLUTION OF THE NEW TRIAL MOTION

After the parties briefed the issue, the trial court held an evidentiary hearing. RP (2/6/17) 3. The State argued that it was inappropriate for the court to hear any testimony, because the evidence Arndt sought to produce inhered in the verdict. RP (2/6/17) 15. The court ruled it would hear the testimony and then determine what parts, if any, were proper to consider at the time it ruled on the motion. RP (2/6/17) 15.

The parties agreed to have the court consider the declarations of Harris and Ms. LaCross in lieu of live testimony. RP (2/6/17) 10. Arndt reserved the right to call Harris to impeach Watson regarding the websites she viewed, which she did. RP (2/6/17) 16. The State also clarified that it was agreeing that the witnesses would testify consistently with their declarations, not that the contents were appropriate matters to consider with regard to the motion. RP (2/6/17) 37.

Watson testified that she worked at Costco. RP (2/6/17) 18. At some point after the case was over she talked to Ms. LaCross, whom she

knew from the past. RP (2/6/17) 19. The conversation was just "chitchat." RP (2/6/17) 23. She did not know at the time that Arndt's counsel was related to Ms. LaCross. RP (2/6/17) 24.

Watson was subsequently contacted by Harris, the defense investigator. RP (2/6/17) 19. She also knew him previously. RP (2/6/17) 24. She told him she had looked up the definition of premeditation. RP (2/6/17) 19. She had Googled it on her phone. RP (2/6/17) 20. She repeated the process for Harris, but the site that came up did not look to her like it was the same one. RP (2/6/17) 20, 27. Exhibits 1, 2 and 3 did not look like the sites that came up when she initially did the search. RP (2/6/17) 21-22. She did not recall if they were the sites she showed Harris. RP (2/6/17) 22-23.

The thing that struck her about the definitions was about premeditation being short. RP (2/6/17) 24, 27. That is, that there was some deliberative process required, however short. RP (2/6/17) 25.

She declined further interviews with Harris because she felt he had misled her as a friend. RP (2/6/17) 26. She did not realize she had done anything wrong looking up the word. RP (2/6/17) 26. She "went over it in [her] head for a long time" and was certain she had not discussed what she looked up with the other jurors. RP (2/6/17) 26.

Harris testified that he interviewed Watson in September 2016. RP

(2/6/17) 30. According to Harris, Watson said that Exhibits 1 through 3 were the websites that she had looked at during trial. RP (2/6/17) 32. She also told him she looked at other sites but could not recall which ones they were. RP (2/6/17) 33.

After the testimony, Arndt conceded that the court could not consider Harris's assertion that Watson said she changed her verdict after looking up the definition because that allegation inhered in the verdict. RP (2/6/17) 38. Arndt further argued that the facts that did not inhere in the verdict were that Watson looked up the term "premeditation," how or where she looked it up, and whether or not she shared it with other jurors, and that she volunteered the information to Ms. LaCross. RP (2/6/17) 38-40. Arndt further argued that once Watson looked up the term, any further discussion she had with the other jurors was misconduct. RP (2/6/17) 41.

The State noted that although Arndt was correct that the court could not consider matters that inhered in the verdict, i.e., the effect of matters on a juror's motives, intent, or beliefs, she omitted the second part of the test. RP (2/6/17) 51. That prong of the test asks whether the fact can be rebutted by other testimony without probing the juror's mental process. RP (2/6/17) 51. In short, the State argued, there must be independent evidence that the misconduct occurred. RP (2/6/17) 51.

After hearing the parties' argument, the court announced it would

issue a written decision. RP (2/6/17) 91. In its memorandum decision, the court concluded that Watson committed misconduct by looking up the definition of premeditation. CP 137. The court nevertheless determined that prejudice could not be found because the definitions Watson saw were indistinguishable from a correct statement of the law of premeditation. CP 138. The court therefore denied Arndt's motion for new trial. CP 138, 140.

III. ARGUMENT

A. ARNDT FAILS TO SHOW THAT A BLANKET DE NOVO STANDARD OF REVIEW IS APPROPRIATE.

Arndt argues that because she raises a constitutional claim the standard of review is de novo. Her contention is contrary to existing Supreme Court precedent. Moreover, given that virtually any issue in a criminal case can be constitutionalized, it would effectively strip all discretion from the trial courts. She fails to show that our Supreme Court intends such a result.

The State finds it curious that Arndt urges this court to apply the "reasoning outlined in *Jones* and *Iniguez*." Brief of Appellant at 9. The "reasoning" in *Jones* is as follows:

> STANDARD OF REVIEW
>
> We review a claim of a denial of Sixth Amendment rights de novo. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009). Since Jones argues that his Sixth

> Amendment right to present a defense has been violated, we review his claim de novo.

State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). *Iniguez*, in turn, provides slightly more analysis:

> At the outset, there is a disagreement over the proper standard of review. The State argues that we review a trial courts' decisions to grant a continuance and deny severance for an abuse of discretion. In contrast, in an amicus curiae brief, the Washington Association of Criminal Defense Lawyers (WACDL) argues that a constitutional question of speedy trial rights is reviewed de novo, citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).
>
> Both sides are, in a sense, correct. It is true that we review the denial of a severance motion for an abuse of discretion. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). Similarly, we review a decision to grant or deny a continuance for an abuse of discretion. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). However, a court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). And we review de novo a claim of a denial of constitutional rights. *See Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005); *see also United States v. Wallace*, 848 F.2d 1464, 1469 (9th Cir.1988) (a Sixth Amendment speedy trial claim is reviewed de novo). Because Iniguez argues his constitutional speedy trial rights were violated, our review is de novo.

State v. Iniguez, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

So, surely *Brown v. State* must provide some reasoning for the position Arndt urges. An examination of that case produces this clarifying point:

> We review the *meaning* of the constitution and statutes de novo.

Brown, 155 Wn.2d at 261 (emphasis supplied).

Following the trail of citations from *Jones* to *Iniguez* to *Brown* takes us back to familiar and basic appellate precepts: fact-based decisions are reviewed for abuse of discretion and legal interpretation is reviewed de novo. Or as the Washington Supreme Court explained more than 20 years ago:

> Within our appellate court system there is no reason to make a distinction between constitutional claims, such as those involved in a suppression hearing, and other claims of right. The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. This remains true regardless of the nature of the rights involved.
>
> There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact.

State v. Hill, 123 Wn.2d 641, 646–47, 870 P.2d 313, 316 (1994) (citations omitted).

Iniguez also cites to *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249, 254 (2007), which observed that "whether … constitutional rights were violated is a question of law that we review de novo." *Perez*,

137 Wn. App. at 105 (*citing State v. Elmore*, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004), *aff'd*, 155 Wn.2d 758 (2005)).

Interestingly, when the Supreme Court affirmed *Elmore*, a juror misconduct case, it provided a rather more nuanced discussion of the standard of review than did the Court of Appeals. There, the defendant argued, as the Court of Appeals held, that "because Elmore's appeal implicates her constitutional rights to a fair and impartial jury, appellate review should be de novo." *State v. Elmore*, 155 Wn.2d 758, 767, 123 P.3d 72 (2005). The State, on the other hand, contended that the matter should be reviewed for an abuse of discretion. *Elmore*, 155 Wn.2d at 768.

As in *Hill*, the Court observed that "Washington courts, as well as the great majority of other courts reviewing juror dismissal, have applied an abuse of discretion standard and found that so long as the trial court has applied the proper legal standard of proof to the evidence, the trial court's decision deserves deference." *Elmore*, 155 Wn.2d at 768-69. The court noted that courts had applied this standard to numerous issues involving jurors, including where, as here, it is alleged the juror has considered extrinsic matters.

After further discussion of the sensitive issues surrounding claims that a juror was refusing to follow the law, the Court concluded that even in that touchy area, this standard remained:

> We affirm the Court of Appeals' adoption of the "any reasonable possibility" standard; where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence. Yet we also emphasize that this standard is applicable only in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law. In addition, we adopt the Eleventh Circuit's position that *once the proper evidentiary standard is applied, the trial court's evaluation of the facts is reviewable only for abuse of discretion*.

Elmore, 155 Wn.2d at 778 (emphasis supplied).

Although *Elmore* involved a deliberating juror, the Supreme Court has applied a similar standard to motions for new trial based on juror misconduct, noting that the trial court's decision "will not be disturbed on appeal unless it is predicated on erroneous interpretations of the law or constitutes an abuse of discretion." *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

The statements in *Jones* and *Iniguez* should be viewed as a shorthand for these well-established principles. First, there is no mention in either of those cases of any intent to overrule the pre-existing jurisprudence. Indeed, in one case Arndt cites, *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013), the Court held point-blank that "[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review."

Ironically, Arndt faults the Supreme Court's holding in *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017), for failing to follow her interpretation of *Jones* and *Iniguez*. However its statement regarding *Jones* makes it clear that the Court did not view that case as altering basic standards of review: "we determine *as a matter of law* whether the exclusion violated the constitutional right to present a defense." *Clark*, 187 Wn.2d at 649 (*citing Jones*, 168 Wn.2d at 719; emphasis supplied). Matters of law are traditionally reviewed de novo.

Further, in *Iniguez*, the Court decided two issues: whether the Washington Constitution's speedy trial provision was more protective than the federal right, and whether Iniguez's constitutional speedy trial rights had been violated. The former is clearly a question of law and a classic case of de novo review. The analysis of the second issue was based on the undisputed facts in the record and was thus, again, an application of the law to the facts. Thus despite the comment Arndt cites, nothing in the actual analysis and holding in *Iniguez* applied a de novo standard of review to matters typically within the discretion of the trial court.

Nor were the issues presented in *Jones* analyzed or decided in any way contrary to the traditional de novo/abuse of discretion divide. There, the trial court excluded testimony about the alleged rape victim's sexual conduct during the res gestae of the crime. The Court determined that the

trial court erred in concluding that the rape shield statute applied to this testimony. The error was again a classic misapplication of the legal standards to undisputed facts.

Finally, it is well-settled that this Court may not decline to follow controlling precedent of the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Moreover, the Supreme Court does not overrule binding precedent sub silentio. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Neither *Jones* nor *Iniguez* nor any other Supreme Court case of which the State is aware has overruled *Elmore*. As such, that case, which addresses issues of alleged juror misconduct, should control. This Court should apply the traditional standard of review.

B. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE JUROR'S REVIEW OF DEFINITIONS OF PREMEDITATION WOULD NOT HAVE OBEJCTIVELY CHANGED THE VERDICT.

Arndt next claims that the trial court erred in finding that the misconduct was prejudicial because the State did not prove the content of the definitions Watson considered. Arndt's argument is contrary to the established precedent that puts the burden on her to establish the existence and nature of the misconduct. Moreover, objectively viewed, under the evidence presented, no juror having found that the fire was arson could have concluded that the murder was not premeditated.

Under CrR7.5(a)(2), a defendant may ask for a new trial after conviction based upon misconduct of the jury. In order to receive a new trial, the defendant must make a "strong, affirmative showing of misconduct … in order to overcome the policy favoring stable verdicts and the secret frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631, 633 (1994). A trial court's ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion. *Balisok*, 123 Wn.2d at 117.

Where a defendant has established juror misconduct, a new trial should be granted only where "something more than a possibility of prejudice must be shown." *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The court must make an objective inquiry as to whether the extrinsic evidence or information could have affected the jury's determinations. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). The court does not make an inquiry into the actual effect of the information as this would become an inquiry into the subjective thought process of the jurors, which inheres in the verdict. *Id.* However, any doubts about whether the extraneous information could have affected the jury must be resolved against the verdict. *Id*. The trial court applied these standards. CP 135, 137.

The court need not grant a new trial if it is satisfied beyond a

reasonable doubt that the misconduct did not contribute to the verdict. *Boling*, 131 Wn. App. at 333; *State v. Fry*, 153 Wn. App. 235, 240, 220 P.3d 1245, 1247 (2009), *review denied*, 168 Wn.2d 1025 (2010) (new trial properly denied where there was no showing consideration of dictionary definition contributed to verdict).

The court made the following findings:

> Here, the facts show that Juror #2 conducted outside research on the definition of "premeditation," and that the definitions she viewed included the word "short" or the phrase "however short." In substance, the Court finds that the definitions viewed by Juror #2 were indistinguishable to the jury instruction and were consistent with the law. Because the known research results, as presented to the Court, were consistent with the jury instruction on premeditation and the law, the Court is satisfied beyond a reasonable doubt that Juror #2's research could not have affected the verdict.

CP 138.

As she did below, Arndt argues that because the State cannot establish the precise websites Watson viewed and what definitions they contained, the trial court had to find the State failed to prove the misconduct could not have affected the verdict. Brief of Appellant at 13. The trial court properly rejected this formulation of the issue:

> As stated earlier, "[a] strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *Balisok*, 123 Wn.2d at 117-18. To base a decision for a new trial on what is "not known"" would be inapposite to the "strong,

> affirmative showing" requirement and would endanger the stability of all jury verdicts. Therefore, this Court's decision relies on evidence that has been credibly presented, not on unknowns.

CP 138.

Arndt's argument ignores the well-established principles, discussed above, that it was *her* burden to establish that the misconduct occurred, and what it consisted of. Arndt only established to the satisfaction of the trial court that Watson "conducted outside research on the definition of 'premeditation,' and that the definitions she viewed included the word 'short' or the phrase 'however short.'" CP 138.

It is well-established under Washington law that "premeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighting or reasoning for a period of time, however short.'" *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (*quotin*g State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)). Under this formulation, Washington Courts have approved the following instructions on premeditation:

> The term premeditate encompasses the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for an appreciable period of time, however long or short, but more than a mere moment in time.

State v. Hughes, 106 Wn.2d 176, 199, 721 P.2d 902 (1986).

> Premeditate means thought over beforehand, for any length of time, however short. When a person after deliberation once forms a design to take human life, after ample time and opportunity for deliberate thought, then no matter how soon the felonious killing may follow the formation of the settled purpose, it will be murder in the first degree. Premeditated malice exists when the intention unlawfully to kill is deliberately thought over and reflected upon before the fatal blow is struck (no particular space of time, however, need intervene between the formation of the intent to kill and the killing)…

State v. Blaine, 64 Wn.122, 128, 116 P. 660 (1911).

> You are further instructed that the term "design to kill" as those words are used in the Information and in these instructions, means purpose or intention to kill.
>
> "A premediated design to kill," as the phrase is used in the Information and in these instructions, means and comprehends a design, or plan, or intention to kill, which has been thought over beforehand or deliberated upon before being carried into effect. There need not be in law any fixed or definite length or period of time elapse between the formation of a design to kill and the carrying out or completion of such design.
>
> Premeditation exists if you find from the evidence, beyond a reasonable doubt, that any length of time elapsed, no matter how short, sufficient to allow an intent to be formed and reflected upon prior to being carried into effect, if the thought and act do not occur concurrently, if there is some appreciable length of time between thought and act.

State v. Tikka, 8 Wn. App. 736, 739-40, 509 P.2d 101 (1973).

It is clear beyond any reasonable doubt that the verdict would have been the same absent a single juror looking up a definition of premeditation on the internet. The evidence in this case in support of

premeditation was substantial.[10]

The record is filled with unrebutted, and unchallenged evidence of premeditation. The four factors indicative of premeditation are motive, procurement of a weapon, stealth and the method of killing. *Pirtle*, 127 Wn.2d at 644.

With regard to motive, Arndt had shown in her history a desire to relieve herself of Junior. She had set two prior fires under very similar circumstances to this case. She had also previously made a false report, trying to get Junior arrested and removed from their home. They had even been arguing the weekend of the murder (about his buying a fire extinguisher of all things).

The evidence also established Arndt's procurement of the "weapon." She ensured that Junior drank a substantial amount of alcohol knowing that when he was intoxicated he slept very deeply and was hard to wake up. She even went out late at night to pick up more alcohol for him to drink. Arndt also set the stage for the fire. Even though she was not supposed to clean downstairs, she cleaned downstairs. She admitted moving the bean bag chairs when she was downstairs, claiming that the

[10] Note that the jury concluded that Arndt intentionally set fire to the house in this case, that Junior died as a result of the fire and that Arndt assaulted multiple victims as a result of the fire. Indeed, objectively a juror would only question the meaning of premeditation after she concluded that Arndt had intentionally killed Junior.

family dog, which never peed in the house, had peed on them. In addition, prior to the night of the fire the Arndt and Junior had slept in her nephew's room. However, on the night she set the fire, she wanted to sleep on the couches in the living room. She then went downstairs with a lighter and lit the bean bag chair that she had placed against a fuel source (the couch).

Arndt also used stealth in this crime. She was sleeping behind Junior on one of the couches in the living room. Thomas was sleeping on the opposite couch. Only after Junior and Thomas had fallen asleep did Arndt get off the couch, without waking them up, proceed downstairs and intentionally set fire to the basement. She then went back upstairs and got back on the couch with Junior. She did all of this without waking anyone up. After the fire was started she then woke up Thomas, telling him that she smelled smoke (even though she knew it was a fire). Thomas then confirmed it was a fire. At this point, she climbed over DJ, without waking him up or even attempting to physically or verbally alert him. Instead, she proceeded to alert everyone else in the house.

The method of killing also speaks to the Arndt's premeditation. Her two prior fires showed that she had a consistent modus operandi. As noted, Arndt took great effort to ensure that Junior would not be in a state to get out of the house on his own. Nor did she take any steps to get him out of the house herself. Rather, she took steps to avoid alerting him. As

previously discussed, she was behind him on the couch and she was aware of how deeply he slept and she was the only one with this knowledge. Despite this, she climbed over him three times without disturbing him either physically or verbally. While she told Thomas to wake Junior, she did not tell Thomas that just yelling at Junior would be insufficient. She also did this despite the fact that Thomas was not next to Junior while she was. Indeed, despite being sharing the couch with Junior, she did not shake him, did not yell to him, and did not pull at him. Instead, she ignored him and, making efforts to avoid disturbing him, went around to get everyone else out of the house. Once outside, the rest of the family realized that Junior, on the upper level, and Autumn Kreifels, on the lower level, were still in the house. Arndt went back into the house with her sister Kelly O'Neil. O'Neil headed downstairs to get her daughter. Rather than going upstairs to try and get Junior, Arndt followed O'Neil downstairs to wake up Kreifels. Arndt made no effort whatsoever to alert Junior to the fire and never attempted to get him out of the home until after she was outside and the house was fully engulfed making it impossible for her return.

The evidence presented by the State in this case was largely uncontested except with regard to the expert testimony regarding arson.

See State v. Arndt, No. 48525-7-II.[11] Arndt argues that the disputed expert testimony shows that the misconduct could not have been harmless. This argument makes no sense. The issue the experts argued about went to whether or not the fire was incendiary (i.e. intentionally set) or not. If the jurors found the fire was accidental, premeditation would plainly not have been an issue.

Arndt bore the burden of establishing that misconduct occurred. The trial court, in a lengthy ruling that cited to the hearing testimony concluded that Watson was credible, that she did not share her research with other jurors, and that the definitions she viewed contained the requirement that premeditation required contemplation, however short. CP 129-37. These findings were within the court's discretion and are supported by the record.

The trial court also concluded that because the definitions viewed by Watson were consistent with the court's premeditation instructions and the law of premeditation, there was no objective prejudice. This ruling was also well within the court's discretion and supported by the record. It should be affirmed.

[11] Present counsel also represents Arndt in that matter.

IV. CONCLUSION

For the foregoing reasons, the trial court's denial of Arndt's motion for new trial should be affirmed.

DATED September 12, 2017.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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